Nos. 79-1738 and 80-945

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW AND
ALEXANDER P. BUTTERFIELD,
Petitioners,

v.

A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS HARLOW AND BUTTERFIELD

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OPINIONS BELOW

The district court's order of March 26, 1980 denying the petitioners' motion for summary judgment is reprinted in Appendix A to the Petition in No. 80-945 (at pp. 1a-10a), but is not officially reported. The order of the court of appeals granting respondent's motion to dismiss the appeal of the district court's order is reprinted in Appendix B to the Petition (at pp. 11a-12a). It also is not officially reported.

JURISDICTION

The district court's order denying the motion of petitioners Bryce Harlow and Alexander Butterfield for summary judgment was entered on March 26, 1980 and was appealed in a timely manner to the United States Court of Appeals for the District of Columbia Circuit. On April 14, 1980, respondent filed a motion seeking either dismissal of the appeal or summary affirmance of the district court order. The motion to dismiss was granted on April 30, 1980 and a motion for rehearing was denied on July 14, 1980 (Pet. App. 13a-14a). On October 4, 1980, the Chief Justice extended the time within which petitioners Harlow and Butterfield could file a petition for writ of certiorari through December 11, 1980. The petition (No. 80-945) was filed on December 11, 1980 and granted on June 22, 1981. Their co-defendant, Richard Nixon,[1] filed a separate petition for certiorari (No. 79-1738), which was also granted on June 22, 1981. The two cases were consolidated by this Court. The jurisdiction of the Court rests upon 28 U.S.C. § 1254(1).

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[1] In the proceedings below and in this Court, President Nixon has been separately represented. References in this brief to "petitioners" and the "Petition" ("Pet.") are references to petitioners Harlow and Butterfield alone and their Petition in No. 80-945. Transcripts of depositions are cited in this brief with the corresponding record references as "[Deponent] Dep. (R.)"; and plaintiff's and defendants' exhibits to depositions are cited as "PX" and "DX."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issue of appealability involves 28 U.S.C. § 1291, which provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Respondent asserts implied causes of action under the First Amendment, 5 U.S.C. § 7211 (employee's right to petition Congress) and 18 U.S.C. § 1505 (felony to injure Congressional witness), the texts of which are reprinted in Appendix D (at pp. 15a-16a) to the Petition.[2]

STATEMENT OF THE CASE

Respondent seeks money damages from a former President and two of his senior advisers, claiming that they participated in a conspiracy twelve years ago to oust him from his Air Force civil service position in retaliation for his Congressional testimony, thus violating his constitutional and statutory rights. The case began seven and a half years ago but has not yet come to trial. The district court denied petitioners' motions for summary judgment that were based in part on the defense of official immunity. It is the denial of these motions — and not the merits of respondent's claim — that is under review.

The following discussion of the circumstances that resulted in the elimination of respondent's civil service job is detailed, but petitioners wish to show that their role in the abolition of respondent's job was wholly peripheral, and accordingly that they ought not as a matter of law be forced to go to trial where

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[2] Respondent's claim for relief under the common law of the District of Columbia, *see* Pet. App. at 2a, has been abandoned. *See* Respondent's Supplemental Brief at 2 (May 14, 1980), *Nixon v. Fitzgerald*, No. 79-1738.

the facts on the record are insufficient to overcome their qualified immunity defense.

Petitioners' Duties in the White House.

From the beginning of the Nixon administration, Bryce Harlow served as the President's top aide for Congressional matters. Harlow Dep. (R. 392) 19, 26. He had served in a similar capacity under President Eisenhower and before that as chief counsel of the House Committee on Armed Services. Harlow Dep. (R. 392) 11, 15. Because of his vast experience, Harlow had been delegated, in the President's words, "broad authority" to deal with any and all aspects of Congressional relations or legislative strategy. Nixon Dep. I (R. 378), 314. The job required daily contact with Cabinet department heads as well as with the Speaker and majority and minority leaders of the House, the majority and minority leaders of the Senate, and the chairmen and ranking members of key committees. On a typical day Harlow was in and out of the President's office several times, conducted or attended numerous White House meetings, discussed legislative strategy with Cabinet members and their aides in his office, made a couple of trips to the Hill, directed the activities of his Congressional relations staff, and somehow disposed of hundreds of telephone calls. Harlow Dep. (R. 392) 25, 29, 32, 33, 35, 189-90.

On November 4, 1969, Harlow was elevated to Cabinet-level status as Counsellor to the President. Harlow Dep. (R. 392) 11-12. He served as Counsellor until December 9, 1970, when he returned to private life. On July 1, 1973, he resumed his duties as Counsellor for a nine-month period until April 14, 1974. *Id.*

Alexander Butterfield served from the beginning of the Nixon administration as Deputy Assistant to the President and Deputy to the White House Chief of Staff (H.R. Haldeman), and was responsible for coordinating White House staff activities. Butterfield Dep. (R. 42) 4, 42, 49-52, 58, 64-66; Haldeman Dep. (R. 418) 46-48. With an office immediately adjacent to the Oval Office, he had daily contact with the President and frequently expressed his recommendations on matters of White

House concern. Butterfield Dep. (R. 41, 42) 63-64, 444, 454. *See* Haldeman Dep. (R. 418) 47-48, 250; Nixon Dep. I (R. 378) 315-16, 367. On November 4, 1969, Butterfield assumed the additional post of Secretary to the Cabinet. Butterfield Dep. (R. 41) 52. He served in both positions until March 14, 1973, when he became Administrator of the Federal Aviation Administration. *Id.* at 3-4.

The Air Force Reorganization.

In the closing months of the Johnson Administration, respondent A. Ernest Fitzgerald, then a civilian cost analyst in the Department of the Air Force, testified before a Congressional subcommittee about potential cost overruns on the Air Force's C-5A transport plane. Fitzgerald Dep. (R. 321) 257-59. *See Hearings Before the Subcommittee on Economy in Government of the Joint Economic Committee,* 90th Cong., 2d Sess., 200 (1968). Fitzgerald complained that as a result of the testimony he was virtually ostracized by his Air Force colleagues. Fitzgerald Dep. (R. 321) 225-37; Fitzgerald Affidavit (R. 28) ¶40. When he received a correction notice about his civil service status shortly after his testimony, he evidently notified *The Washington Post,* which produced a front-page article on the "retaliatory" civil service correction. J.A. 70a-71a, 73a-74a, 81a-82a (*Decision on the Appeal of A. Ernest Fitzgerald,* U.S. Civil Service Commission, Appeals Examining Office, at 8, 10-11, 16-17 (Sept. 18, 1973) (hereinafter cited as CSC Decision)). Air Force officials surmised — apparently correctly, as the Civil Service Commission later found — that Fitzgerald had planted the story "for the purpose of placing the Air Force in a bad light." J.A. 82a (*Id.* at 16-17). In the last few days of the Johnson administration, Fitzgerald was told by his immediate superior, Assistant Secretary Thomas Nielsen, that he had lost his "usefulness" to the Air Force. Fitzgerald Dep. (R. 321) 234; J.A. 73a-74a (CSC Decision 10, 11).

However, not having been tarnished by Fitzgerald's C5-A disclosures, the Nixon administration had no reason for hostility toward him. Nixon Dep. I (R. 378) 24-25; J.A. 81a (CSC Decision 16). In fact, incoming Secretary of Defense Melvin Laird and Secretary of the Air Force Dr. Robert Seamans

assured Congressional committees that Fitzgerald would not be the object of any retaliation. PX 110; *see* PX 117.

Secretary Laird, in order to gain better cost control over Air Force weapons systems, brought in his own, "more effective team" and replaced Assistant Secretary Nielsen, who had previously proposed a reorganization of the Air Force's Office of Financial Management. Seamans Dep. (R. 334, 335) 2-76 to -79; 3-189, -190, -210 (J.A. 150a, 159a-60a); Laird Dep. (R. 455) 77-78, 97-98. Nielsen's proposal, which would have eliminated Fitzgerald's position in that office of Deputy for Management Systems, was rejected by Seamans because he wanted his own newly-appointed Secretary, Spencer Schedler, to take an independent look at the question. Seamans Dep. (R. 334, 335) 2-79; 3-234 (J.A. 150a, 171a). Laird and Seamans met in the spring of 1969 to discuss reorganizing the office in order to improve its efficiency at controlling weapons cost. Seamans Dep. (R. 334) 2-44, -45; Laird Dep. (R. 455) 64, 66-68.

Harlow's Role.

Aware that Fitzgerald had attracted the attention of several Congressmen, Laird asked Seamans to request the White House staff to assess the potential political backlash on Capitol Hill if Fitzgerald's position were eliminated. Seamans Dep. (R. 334, 335) 2-113 to -115; 3-191 (J.A. 150a-51a, 160a-61a). Seamans called Harlow for this purpose on May 9, 1969. Seamans' uncontradicted testimony is that "we [the Air Force Department] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." *Id.* at 2-134; 3-199, -200 (J.A. 153a, 164a-65a). Harlow's aide called Seamans back later that day to say that "this was a very sensitive item on the Hill and that it would be their recommendation that we [the Air Force] not proceed to make such a change at that time." *Id.* at 2-117 (J.A. 152a). Seamans' testimony, again uncontradicted, is that neither Harlow nor his aide expressed an opinion on the proposal to eliminate Fitzgerald's position, and they did not suggest an alternative time for its adoption. *Id.* at 2-125, -126, -132, -135, 3-202 (J.A. 166a).

A few days after Seamans' telephone call, he met Harlow "by happenstance" (*id.* at 2-142; *see* Harlow Dep. (R. 392) 57-60) at a White House breakfast for Congressmen and gave him an "update" on the Fitzgerald matter. Seamans Dep. (R. 334) 2-142 (J.A. 154a). Again, as Seamans himself admitted, Harlow did not give "any advice or counsel." *Id.*

During the summer, Laird and his staff met with Fitzgerald in an attempt to find out whether Fitzgerald's abilities could be utilized on the staff of the special DOD Blue Ribbon Panel or in some other position. Laird Dep. (R. 455) 9-11; J.A. 78a-79a (CSC Decision 14). Fitzgerald sent a memorandum to the chairman of the Panel saying that "[a]side from publicity, my situation is unique only in that I have not gone away quietly as have most others of my experience and bent." J.A. 79a (CSC Decision 14). The Civil Service Commission later ruled that "Secretary Seamans properly considered [this] statement to be a fairly inflammatory kind of statement .... [He] considered that Mr. Fitzgerald had a chip on his shoulder. It is clear that Mr. Fitzgerald was not interested in a position on the [Blue Ribbon] Panel." *Id.* Indeed, it soon became apparent to Laird that Fitzgerald simply "did not want to serve in a staff position ... in the Department of Defense." Laird Dep. (R. 455) 10, 79-80; *see* DX 133 at July 2, 1969.

On November 3, 1969, a year after Fitzgerald's Congressional testimony and six months after the telephone call to Harlow, Seamans approved an Air Force reorganization plan presented to him by Assistant Secretary Schedler. Seamans Dep. (R. 335) 3-188 to -190 (J.A. 158a-60a). Schedler's plan was part of a Department-wide "reduction-in-force" that resulted from Laird's order that the Air Force "reduce expenditures one billion dollars" and make "large cut-backs in military and civilian personnel ...." J.A. 66a (CSC Decision 4). *See* Seamans Dep. (R. 335) 3-190, -203, -209, -210, -219, -253, -254 (J.A. 190a, 166a-67a, 169a). As part of these cut-backs, the Office of Financial Management "was assigned a net reduction of two [positions]." J.A. 66a (CSC Decision 4, 5). The plan called for the reorganization of that office and entailed, among other things, the elimination of Fitzgerald's position, effective on January 5, 1970. The White House had no

part in Seamans' decision to approve the reorganization plan. Seamans Dep. (R. 335) 3-69, -188 to -190, -200, -202, -203 (J.A. 158a-60a, 165a-66a). Seamans called Harlow the day *after* approving the plan simply to inform him about it. Seamans Dep. (R. 334) 2-203, -204.

Concerned by press speculation that the President might overrule the Air Force, Seamans, again at Laird's request, called Harlow on December 5, 1969 to explain why the decision should stand: it was "part of a total, important plan of the Air Force; and, having made the decision on what [Seamans] felt were good and satisfactory reasons, [he] didn't want to see it changed." Seamans Dep. (R. 335) 3-219 (J.A. 169a). *See id.* at 3-57, 3-110 to -112; Laird Dep. (R. 455) 14, 17-18, 72-73, 98. Although he understood that Seamans was concerned, Harlow remained noncommittal. Seamans Dep. (R. 355) 3-111. In reaction to Harlow's evident neutrality, if not opposition, to the Air Force reorganization — it would, after all, somewhat complicate Harlow's dealings with Congress — Deputy Secretary of Defense David Packard called Harlow later that day to register his "vehement protest" against any White House interference. PX 141 (J.A. 227a). Harlow relayed this message to Haldeman without any comment. *Id.*

Butterfield's Role.

Butterfield's contacts with the Fitzgerald matter did not occur until *after* the decision to abolish Fitzgerald's job had been made. They consisted merely of one telephone call and one memorandum to Haldeman, his immediate superior. These came about because President Nixon, prompted by a question at his December 8th press conference, requested Haldeman to look into the possibility of finding another job for Fitzgerald. Nixon Dep. II, 10; DX 163; DX 181 (J.A. 276a, 287a). Haldeman asked Butterfield about the matter. Reporting back by telephone to Haldeman in San Clemente, Butterfield recommended that the White House not make an attempt to locate another position for Fitzgerald. DX 163; DX 165; DX 169; DX 170 (J.A. 276a, 277a, 278a, 279a). Neither the fact nor substance of this telephone call was communicated to either the Defense Department or the Air Force. *See* Laird

Dep. (R. 455) 15, 22 (J.A. 123a-24a); Seamans Dep. (R. 335) 3-240, -241 (J.A. 172a); Nixon Dep. I (R. 378) 331-32.

In early January, anticipating a question at the next press conference, the White House Press Office asked Butterfield whether the Administration had formulated a position on the Fitzgerald matter. Butterfield Dep. (R. 41, 42) 131, 294-95. In a memorandum dated January 20, 1970, Butterfield informed Haldeman of the Press Office inquiry and, in keeping with White House staff practice (Nixon Dep. I (R. 378), 366-67; Buchanan Dep. (R. 414) 120-21) and Butterfield's own relationship with Haldeman, recommended a course of action. Butterfield Dep. (R. 42) 127-30, 134, 137 (J.A. 99a, 100a). The memorandum said that, since Fitzgerald should "be given very low marks in loyalty," the White House should not interfere with the Air Force's decision, but "let [Fitzgerald] bleed, for a while at least." PX 12 (J.A. 180a). Although given routine White House distribution "so that Haldeman could get the benefit of everyone's views on the subject" (Butterfield Dep. (R. 42) 144, 148 (J.A. 101a-03a)), the memorandum was not sent to anyone in the Air Force or Defense Departments. Indeed, Butterfield never communicated on the subject with anyone in either Department and he never mentioned the subject to the President, with whom he had daily contact. PX 12; Butterfield Dep. (R. 41) 231, 440-43. *See* Laird Dep. (R. 455) 22, 83-84; Seamans Dep. (R. 335) 3-240, -241.

Butterfield's memorandum, in the words of General Alexander Haig, then deputy to the National Security Affairs adviser, was accorded no "particular significance," as there were "literally hundreds of papers of this kind coming through." Haig Dep. (R. 470) 38. Actually, contrary to Butterfield's suggestion, the President himself and his staff did make several attempts to find another position in the federal government for Fitzgerald. Nixon Dep. I (R. 378) 10, 28, 220-24; Nixon Dep. II, 10-14. Apparently, however, the White House's efforts were resisted — the Bureau of the Budget, for example, was reluctant to take Fitzgerald for fear that he would "be a disruptive factor." Schlesinger Dep. (R. 432) 5-7 (J.A.

146a-48a); Mayo Dep. (R. 460) 5-6 (J.A. 126a-27a). Since the Fitzgerald matter was not of overriding importance for the White House, the effort to find another job was displaced, according to Haldeman, by "at least a thousand other items of a magnitude of a hundred times the magnitude of [the Fitzgerald matter]." Haldeman Dep. (R. 418) 102-13. *See* Nixon Dep. I (R. 378) 17-18, 30-31, 160-163.

Fitzgerald's Pursuit of a Civil Service Remedy.

Fitzgerald left government employment on January 5, 1970, when the elimination of his position became effective. On January 20, 1970, Fitzgerald appealed to the Civil Service Commission, which, after proceedings lasting over a three-year period, ruled that "the evidence of record does *not* support [Fitzgerald's] allegation that his position was abolished ... in retaliation for his [Congressional] testimony." J.A. 81a (CSC Decision 16 (emphasis added)). However, the Commission did find that the use of the "reduction-in-force" method of eliminating Fitzgerald's position was wrong, as it "improperly resulted from and was influenced by reasons purely personal to [Fitzgerald]."[3] *Id.* at 19-20 (J.A. 86a). Since the formal requirements of a "reduction-in-force" had not been complied with, the Commission ordered that Fitzgerald be reinstated with back pay. *Id.* at 20-21 (J.A. 87a, 88a).

[3] Apparently, according to the Commission, the Air Force should have instead employed the "adverse action procedures," the current version of which is codified at 5 C.F.R. § 752 (1981). *See* J.A. 67a-69a, 85a-86a (CSC Decision at 6, 19-20). With respect to the "personal" factors surrounding Fitzgerald's dismissal, the Commission found "that the unjust publicity the Air Force received concerning [the civil service] tenure controversy, which it considered Mr. Fitzgerald to be basically responsible for, was the prime factor in the deterioration of relationships and development of an adversary environment between Mr. Fitzgerald and the Air Force." J.A. 82a (CSC Decision at 17). Noting that the Air Force considered Fitzgerald to be "not a 'team player,'" the Commission further observed that "we find [it] difficult to accept [Fitzgerald's denial] that he was 'Senator Proxmire's boy in the Air Force . . . .'" J.A. 83a (CSC Decision at 17).

At the Commission hearings early in 1973, Seamans invoked executive privilege in answer to several questions. Asked about this at his January 31, 1973 press conference, President Nixon said that he stood by the decision to terminate Fitzgerald. However, in a meeting with aides right after the press conference, Nixon privately acknowledged that he had confused the Fitzgerald matter (which, after all, had occurred three years earlier) with the case of Gordon Rule, another Pentagon civil servant who had also been dismissed. Nixon Dep. I (R. 378) 12, 13. The President told John Ehrlichman, "I'm thinking of another guy actually ... I had two names in my mind .... I really didn't know the question, but I had to back up the son of a bitch Seamans." Nixon Pet. App. 18a (transcript of conversation with John Ehrlichman) (J.A. 220a). The next day, the White House press secretary issued a public retraction of Nixon's comments regarding Fitzgerald. Nixon Dep. I (R. 378) 13, 131. PX 84 at pp. 4-5.

Apparently, the President was still confused a month later when Press Secretary Ronald Ziegler informed him that reporters were continuing to pursue the Fitzgerald matter. Upon being told that "when we came in it was all Harlow's ballgame," the President replied, "Bryce was all for canning him, wasn't he?" Ziegler answered, "No, I think Bryce may have been the other way." The President continued, "You see, the case I was thinking about, when you asked me, was the other case — ... the [Gordon] Rule case, that's right." Nixon Pet. App. 28a (transcript of conversation with Ronald Ziegler) (J.A. 282a-83a).

Although reinstated by the Air Force with back pay in 1973, Fitzgerald again appealed to the Civil Service Commission, this time claiming that his new position was not equivalent to his old one. After hearings, a Commission appeals officer ruled that the reinstated position was equivalent, but Fitzgerald appealed this ruling to the federal district court, which on March 3, 1981 overturned it as arbitrary and capricious. *Fitzgerald v. Hampton,* Civ. No. 76-1486 (D.D.C. Mar. 3,

1981).[4] The district court ordered the Air Force to place Fitzgerald in a new position with rank and qualification requirements similar to his old position. *Id.*

The Present Case.

Claiming that reinstatement and back pay was insufficient compensation, Fitzgerald also initiated a civil action in federal district court in January, 1974 against Laird, Seamans, six other high-ranking Air Force and Defense Department officials, and Butterfield, seeking over $3,500,000 in compensatory and punitive damages for the allegedly retaliatory firing. The district court (Gesell, J.) granted defendants' motion for summary judgment based on the statute of limitations, since the suit had been commenced more than three years after Fitzgerald's job had been abolished. *Fitzgerald v. Seamans,* 384 F. Supp. 688 (D.D.C. 1974). Fitzgerald appealed to the Court of Appeals for the District of Columbia Circuit, which affirmed the decision as to all but the one defendant who had nothing to do with Fitzgerald's cause of complaint — Butterfield. Butterfield remained in the suit because, according to the court of appeals, Fitzgerald had no reason before 1973 (when the statutory period ran out) to know of any White House involvement in the decision to abolish his position. *Fitzgerald v. Seamans,* 553 F.2d 220 (D.C. Cir. 1977).

His attempt to sue Pentagon officials having come to naught, Fitzgerald directed his discovery efforts at White House personnel. During the course of extended discovery proceedings, it emerged that Nixon and possibly Harlow might have been peripherally involved in the Fitzgerald matter. In

[4] The *Hampton* case, like the present one, is one of several that Fitzgerald initiated over the loss of his job. In another suit against the Chairman of the Civil Service Commission, he challenged the Commission's rules that required closed hearings and demanded that the hearings on his case be open to the press and the public. *Fitzgerald v. Hampton,* 467 F.2d 755 (D.C. Cir. 1972). He also sought to recover costs and attorneys fees in *Fitzgerald v. United States Civil Service Commission,* 554 F.2d 1186 (D.C. Cir. 1977), and interest on his back pay award in *Fitzgerald v. Staats,* 578 F.2d 435 (D.C. Cir.), *cert. denied,* 439 U.S. 1004 (1978), but both requests were denied as being contrary to the Veterans' Preference Act of 1944.

September, 1978 — almost nine years after the Air Force reorganization — the district court on remand permitted the filing of a Second Amended Complaint adding Nixon and Harlow as defendants. R. 151 (*see* J.A. 16a).

Denial of Summary Judgment on the Immunity Issue.

Despite six years of discovery, Fitzgerald has not succeeded in uncovering a single shred of evidence showing that petitioners Harlow and Butterfield had in any way initiated or approved the Air Force reorganization or had ever initiated any contact with the Air Force or Defense Departments regarding Fitzgerald.

On February 12, 1980, the petitioners filed a new motion for summary judgment on the grounds, *inter alia*, that a grant of absolute immunity was "essential for the conduct of the public business," under *Butz v. Economou*, 438 U.S. 478, 507 (1978), or alternatively, that they were entitled to qualified immunity because Fitzgerald had failed to show any evidence of their wrongful conduct.

On March 26, 1980, the district court, citing *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided court*, 452 U.S. ____ (June 22, 1981), as controlling, rejected petitioners' claim of absolute immunity, ruled that the issue of qualified immunity must be submitted to the jury because "[g]enuine issues of fact remain" as to (among other things) the question of malice and bad faith, and denied the motion for summary judgment. Pet. App. 3a.

The petitioners appealed the district court's rejection of their immunity defense to the court of appeals; the respondent filed a motion alternatively seeking dismissal of the appeal or summary affirmance of the district court's order. The respondent argued that, in view of the D.C. Circuit's decision in *Halperin*, the denial of immunity was not appealable at that stage. Although it issued no opinion, the court of appeals evidently concurred with this jurisdictional contention, because on April 30, 1980 it granted respondent's motion to dismiss the appeal and on July 14, 1980 denied petitioners' petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 13a-14a. Since it dismissed rather than affirmed, the court of

appeals obviously did not address the merits of petitioners' immunity defense.

Thus, with discovery and pretrial conferences completed, this protracted case is now poised for trial. Unless this Court decides that respondent has not stated a claim for relief or that the district court's denial of the immunity defense is immediately appealable and erroneous, petitioners will be put to the burden, expense, and risk of a trial that is now estimated to require at least two months and (based on the pretrial witness lists) involve 75 witnesses.

SUMMARY OF ARGUMENT

I

Pretrial denials of the defense of absolute immunity are immediately appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Thus, the court of appeals' dismissal of petitioners' appeal was clearly contrary to the express rulings of this Court and the other courts of appeals. Since "the purpose behind absolute immunity is as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of trial .... [t]he full protection of absolute immunity would be irreparably lost if review had to await the final judgment." *Briggs v. Goodwin*, 569 F.2d 10, 59 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

As the fundamental purpose of qualified immunity is similarly to avoid the burdens and hazards of a trial, a denial of qualified immunity should be no less appealable than a denial of absolute immunity.

II

Respondent cannot imply a cause of action under the Constitution, 5 U.S.C. § 7211 or 18 U.S.C. § 1505. For this reason, the Court need not reach the questions of official immunity presented by this case. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* precludes the

implication of a constitutional cause of action against federal officials where there are "special factors counselling hesitation." 403 U.S. 388, 397 (1971). Because of the need to accord the government the "widest latitude" in the handling of its internal affairs, it has been recognized that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy." *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981). *Bivens* also established that the availability of alternative remedies is relevant to the implication of a constitutional cause of action. In the present case, as in *Bush v. Lucas*, respondent has successfully availed himself of Civil Service Commission relief, has obtained judicial review of that relief, and has been reinstated and granted back pay. Moreover, since respondent's constitutional cause of action is unfounded, his unprecedented assertion of an implied private right of action under the other federal statutes is even less meritorious. This Court has clearly stated in *Davis v. Passman*, 442 U.S. 228 (1979), that statutory causes of action would be implied far less readily than would constitutional ones.

III

A. The justification for absolute immunity is that the fear of civil litigation and damages liability "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). In recognition of this overriding public interest in the effective functioning of government, this Court has extended absolute immunity to judges, prosecutors, legislators, and even to civil service hearing examiners and agency attorneys participating in federal administrative proceedings. *See Butz v. Economou*, 438 U.S. 478 (1978).

B. As articulated in the brief of co-petitioner Nixon, it is clear that the President is entitled to absolute immunity, and it follows that senior advisers whose functions are "essential" to the President's discharge of his constitutional duties should be derivatively entitled to the same immunity. Congressional staff members have a derivative right to the absolute immunity

enjoyed by Members of Congress under the Speech and Debate Clause; surely the rationale for this rule applies with even greater potency to senior advisers to the nation's Chief Executive. Absolute immunity for the President alone would be of little value if his senior advisers were restricted in the "unflinching discharge" of their duties by the fear of potential lawsuits. "The President's need for complete candor and objectivity from advisers calls for great deference from the courts," and, as this Court has previously recognized, these considerations are "fundamental to the operation of Government and [are] inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon,* 418 U.S. 683, 706, 708 (1974). Only those aides who directly advise the President in the performance of his public duties or who are directly and intimately involved in the discharge of those duties require, and thus have a derivative right to, the protection of absolute Presidential immunity.

C. While federal executive branch officials are generally entitled only to qualified immunity against allegations of constitutional deprivations, this Court has recognized that there are "exceptional situations" involving officials who have "special functions" for which the protection of absolute immunity "is essential for the conduct of the public business." *Butz v. Economou, supra,* at 507-08. The activities and responsibilities of senior presidential advisers who deal on a daily basis with matters of critical importance to the nation are clearly "special functions" that independently (apart from the derivative basis noted above) warrant the protection of absolute immunity.

The actions or inactions of the President and his senior advisers, like the decisions of judges and prosecutors (who are absolutely immune), have a direct and far-reaching impact. Yet the President's key advisers are to a far greater extent than judicial officials the objects of constant and sharp public attention, and must often make their decisions under exigencies and pressures that are far more intense. These pressures preclude an independent and detailed investigation of every matter referred to the White House by an executive department, and thus senior Presidential advisers, in deciding which matters warrant further review by the White House staff or the

President himself, must rely on information supplied by the executive department. The sheer number of matters presented to them in this difficult role virtually guarantees that senior Presidential advisers would — absent absolute immunity — be the target of numerous vindictive lawsuits. Indeed, their vulnerability to harassing litigation is illustrated by this very case.

D. Allowing only a qualified immunity, which could be overcome by a showing of the official's unreasonable or bad faith actions, would not provide at the time of decision-making the requisite assurance that the official will be free from the burdens and risks of any potential lawsuit. Even if an effective means of summary disposition of qualified immunity cases were available (*see* Point IV, *infra*), it is still possible that innocent officials would be subject to the burdens of a full trial. The potential for this kind of recurring judicial oversight of White House discretionary activities was clearly not intended by the Framers of the Constitution. Were the President and his senior advisers to be denied absolute immunity, White House advisers such as petitioners here would be faced with the unfair and perhaps impossible task of conveying to a lay jury years later the "grave, complex and unique responsibilities" of the Presidency, and the reasonableness and good faith of their "political [and often] highly controversial acts." *Halperin v. Kissinger*, 606 F.2d 1192, 1214-15 (D.C. Cir. 1980). This would inevitably prove so burdensome as to be "unduly disruptive of the Executive Branch and, therefore, unconstitutional." *Nixon v. Administrator of General Services*, 433 U.S. 425, 445 (1977).

E. The question of precisely which Presidential advisers apart from petitioners here are senior enough to warrant the protection of absolute immunity may be left open for a future case. In any event, the argument that it may be difficult to draw a line as to which officials are entitled to this protection should not be a reason to deny absolute immunity to petitioners here. If the Court desires to resolve this question, it should, in conformity with its prior immunity decisions, balance the "plaintiff's right to compensation with the need to protect the decision-making processes of an executive department." *Butz v. Economou, supra*, 438 U.S. at 503. Under this balancing

approach the need to redress genuine constitutional injuries would be weighed against the need to protect those officials whose policy and decision-making responsibilities are likely to provoke lawsuits by aggrieved individuals. Given the statutory and administrative remedies typically available to a plaintiff injured by White House review of an executive department's action — especially in the area of personnel matters — a grant of absolute immunity would rarely leave plaintiffs without a means of redress for a genuine constitutional injury.

IV

If senior Presidential advisers are not entitled to absolute immunity, either derivatively or because of their "special functions," then they will be entitled under *Butz v. Economou* only to qualified immunity. By typically denying motions for summary judgment, on the ground that the barest allegation of malice or bad faith automatically raises a triable issue of fact, the lower courts have routinely belied the confidence expressed in *Butz* that qualified immunity would prove "workable." Qualified immunity has thus become an illusory defense.

One suggestion for giving life to the defense as envisioned in *Butz* would be to require plaintiff to "establish after the completion of discovery and before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith." *Halperin v. Kissinger, supra,* 606 F.2d at 1215 (Gesell, J., concurring). To give meaning to the "clear and convincing" requirement and encourage a degree of uniformity and predictability, the lower courts could, in determining the requisite quantum of evidence needed to overcome the defense, consider the same factors used in the balancing approach to absolute immunity discussed above (*i.e.,* the nature and breadth of the official's responsibilities, the strength and sufficiency of the evidence bearing on malice, the remoteness of the defendant from the alleged injurious action, and the availability of alternative remedies).

Under this approach, it is clear that this case is precisely the kind of patently "insubstantial lawsuit" that should have

been "quickly terminated." *Butz v. Economou, supra,* 438 U.S. at 527. The total absence of any evidence whatsoever that petitioners were responsible for the Air Force's decision to eliminate respondent's civil service position unquestionably bars any finding that respondent has met the "preponderance" (much less the "clear and convincing") test. Considering the level and scope of petitioners' duties and responsibilities, the wholly speculative and circumstantial nature of respondent's evidence, petitioners' remoteness from the Air Force decision, and respondent's reinstatement with back pay by order of the Civil Service Commission, respondent has surely not adduced enough evidence to justify putting two senior Presidential advisers through the ordeal of a trial. To force them to trial in the face of this "thin" a record, against these specious claims, would open senior advisers in every administration to the inevitable risks and burdens of trial and would thus cause them to live and govern in fear of financial ruin. This pernicious threat to the administration of government should be eliminated.

ARGUMENT

I. THE DENIAL OF THE IMMUNITY DEFENSES WAS A FINAL, COLLATERAL ORDER, APPEALABLE UNDER *COHEN V. BENEFICIAL INDUSTRIAL LOAN CORP.*

Although respondent has apparently conceded the point (by not addressing it in his brief opposing the Petition)[5], the

[5] Respondent had earlier argued in this Court that this case was not "in" the court of appeals (within the meaning of 28 U.S.C. § 1254), "because that court had granted respondent's motion to dismiss for lack of jurisdiction." Brief for Respondent in Opposition at p. 2, *Nixon v. Fitzgerald,* No. 79-1738. The assertion that this Court has no power to review a court of appeals dismissal for want of jurisdiction is clearly erroneous. *See, e.g., Gardner v. Westinghouse Broadcasting Co.,* 437 U.S. 478 (1978) (*certiorari* granted to review jurisdictional dismissal by court of appeals). As noted above, respondent apparently recognized this and did not reiterate the argument in response to the Petition in No. 80-945. *See* Brief for Respondent, *Harlow & Butterfield v. Fitzgerald,* No. 80-945 (Feb. 9, 1981).

question of the appealability of the denial of petitioners' immunity defenses is so closely related to the rationale for the immunity defenses discussed below that it merits some comment.

The circumstances in which district court orders are immediately appealable under the *Cohen* collateral order doctrine were recently summarized in *Coopers & Lybrand v. Livesay*, in which the Court stated that such orders may be appealed if they (i) conclusively determine the disputed question, (ii) resolve an important question completely separate from the merits of the action, and (iii) are effectively unreviewable on appeal from a final judgment. 437 U.S. 463, 468-69 (1978), *citing Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

These circumstances are present when a district court rejects the defense of absolute immunity. Since "the purpose behind absolute immunity is as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of trial .... [t]he full protection of absolute immunity would be irreparably lost if review had to await final judgment." *Briggs v. Goodwin*, 569 F.2d 10, 59 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978) (assertion of witness and prosecutorial immunity). *See Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (immunity "was designed to protect [officials] 'not only from the consequences of litigation's results, but also from the burden of defending themselves.' "), *quoting Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

Recognizing that any pretrial denial of this defense must be immediately appealable if it is to have any meaning at all, this Court on at least two occasions in recent years has expressly held that denials of immunity defenses are appealable under the *Cohen* collateral order doctrine. *See Helstoski v. Meanor*, *supra* (immunity under the Speech and Debate Clause); *Abney v. United States*, 431 U.S. 651 (1977) (immunity on ground of double jeopardy). Moreover, until the D.C. Circuit's dismissal in this case, all the courts of appeals (including other panels of the D.C. Circuit itself) that had considered the issue were in accord. *See, e.g., Forsyth v. Kleindienst*, 599 F.2d 1203, 1208-09 (3d Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth*, 453

U.S. ____ (June 29, 1981) (assertion of absolute immunity by Executive Branch officials).[6]

A denial of qualified immunity should be no less appealable than a denial of absolute immunity. In each case, the key function of the defense is to avoid a trial on the merits, and this function would be nullified if appellate review of the defense had to be postponed until final adjudication of the merits of the case.[7] An order denying a defendant's right to avoid a trial on

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[6] The Third Circuit has expressly ruled that

> a pretrial denial of the defendants' motions for summary judgment on the issue of absolute immunity is appealable under the *Cohen* collateral order doctrine. Appellate review . . . [prior to trial] will conclusively determine the disputed question and will resolve an important issue completely separate from and collateral to the question of the defendants' guilt or innocence. Moreover, the denial of absolute immunity is effectively unreviewable on appeal. *Since the right which absolute immunity protects is the right not to be subjected to trial, it is irretrievably lost if appellate review must await final adjudication on the merits.* [*Forsyth v. Kleindienst*, 599 F.2d 1203, 1208-09 (3d Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth*, 453 U.S. ____ (June 29, 1981) (assertion of absolute immunity by executive branch officials) (emphasis added).]

The Second Circuit is in accord, having recently denied a plaintiff's motion to dismiss an appeal of a pretrial denial of an immunity defense. *Clark v. United States*, 624 F.2d 3, 4(2d Cir. 1980) (briefing permitted by court of appeals on claim of immunity by former President Nixon). Other panels of the District of Columbia Circuit itself have expressly recognized the immediate appealability under the *Cohen* collateral order doctrine of a district court's denial of an immunity defense. *See Dellums v. Powell*, No. 80-1331, slip op. at 4 & n.5, (D.C. Cir. July 24, 1981); *Briggs v. Goodwin, supra; McSurely v. McClellan*, 521 F.2d 1024 (1975), *aff'd in pertinent part en banc*, 553 F.2d 1277, 1283-84 n.18 (D.C. Cir. 1976), *cert. dismissed sub nom. McAdams v. McSurely*, 438 U.S. 189 (1978) (immunity under Speech and Debate Clause).

[7] As the D.C. Circuit said in *Briggs v. Goodwin, supra*,

> To paraphrase *Abney*, even if the defendant here is held not liable in damages, or, if held liable, has his liability ultimately reversed on ... immunity grounds, "*he has still been forced to endure a trial that the* [*doctrine of absolute immunity*] *was*

(footnote continues)

qualified immunity grounds would, to paraphrase the Court's holding in a double jeopardy case,

> constitute a complete, formal, and, in the trial court, final rejection of a ... defendant's [qualified immunity] claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the [qualified immunity defense]. Hence, *Cohen's* threshold requirement of a fully consummated decision is satisfied. [*Abney v. United States, supra,* 431 U.S. at 659.]

In view of the weight of authority on precisely this issue, it is clear that the district court's denial of petitioners' summary judgment motion was an immediately appealable collateral order, that the court of appeals accordingly had jurisdiction over the appeal under 28 U.S.C. § 1291 and incorrectly declined to exercise it, and that this Court therefore has jurisdiction over this case under 28 U.S.C. § 1254.

II. SINCE RESPONDENT HAS ALREADY AVAILED HIMSELF OF HIS ALTERNATIVE STATUTORY REMEDY, HE CANNOT NOW ASSERT AN IMPLIED CONSTITUTIONAL OR STATUTORY CAUSE OF ACTION.

This Court need not reach the questions of official immunity presented by this case if it does not wish to do so, for the simple reason that the respondent has no cause of action.[8]

(footnote continued)

> *designed to prohibit."* [569 F.2d at 59-60, *quoting Abney v. United States, supra,* 431 U.S. at 662 (bracketed material and emphasis in original).]

There is no reason why this rationale should not also apply to qualified immunity.

[8] Petitioners recognize that the Court in the ordinary course would not consider the question of the existence of an implied constitutional or statutory cause of action in this case, because it was not among the Questions Presented in their *certiorari* petition. However, the question was discussed in the Petition (at p. 14 n.9), and was expressly advanced (and briefed) in the district court as an independent ground for the granting of petitioners' motion for

(footnote continues)

Respondent seeks damages arising from the elimination of his Air Force job. He purports to find the source of his claim to damages in *Bivens v. Six Unknown Named Agents of the*

(footnote continued)

summary judgment. *See* R. 452 (Memorandum of Points and Authorities in Support of Harlow's and Butterfield's Motion for Summary Judgment).

Petitioners now respectfully ask this Court simply to do the converse of what it did in *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978). There the petitioner asked the Court to grant *certiorari* to review the question of whether the plaintiff had stated a cause of action for violation of his constitutional rights under 42 U.S.C. § 1983. The Court did grant *certiorari* as to that question, but then addressed the question of whether respondents were entitled to official immunity. The immunity and cause of action issues are intertwined, in that the effect of granting immunity and denying a cause of action are the same. Consequently, the Court said that the immunity issue was "fairly comprised" by the cause of action question. *See* Sup. Ct. R. 21.1(a). The Court further noted that "[i]n any event, our power to decide is not limited by the precise terms of the question presented." 434 U.S. at 559-60 n.6.

Petitioners note that this Court has on other occasions not hesitated when appropriate to address issues that were not posed by the parties in their petitioning papers. *See, e.g., Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 48 n.34 (1977); *Rogers v. United States*, 422 U.S. 35, 41 (1975); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 319-20 (1971); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Moreover, this Court clearly has power under 28 U.S.C. § 1254 to review all aspects of any "[c]ases" that are "in the courts of appeals," which this one clearly was. The Court is thus not constrained in deciding cases solely on the legal issues that were expressly before the lower appellate court. Actually, the lower appellate court itself could have addressed these other issues "in conjunction with [its] review of defendants' appeal from the collateral order denying absolute immunity." *Dellums v. Powell*, No. 80-1331, slip op. at 5 n.6 (D.C. Cir. July 24, 1981).

Finally, the interests of judicial economy also suggest that the cause of action question be resolved at this point. The question is squarely presented, and this Court can now dispose of all legal issues in the case. Consequently, it would be a waste of judicial resources, as well as an unfair burden on petitioners, to have to go through the exercise of a trial, only to have the court of appeals (or perhaps this Court) in reviewing the final judgment, determine that there was no cause of action after all.

Federal Bureau of Narcotics, 403 U.S. 388 (1971), and *Davis v. Passman*, 442 U.S. 228 (1979), both of which found an implied right of action for damages arising from the violation of constitutional rights. On the facts of this case, however, it is clear that he has no constitutional cause of action. Just last year, in *Carlson v. Green* this Court held that

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case ... when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." [446 U.S. 14, 18 (1980), *quoting Bivens v. Six Unknown Named Agents, supra*, 403 U.S. at 396.]

As the Fifth Circuit has noted in a case remarkably similar to petitioners', the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy" because the federal government should be accorded the "widest latitude" in the handling of its internal affairs.[9] *Bush v. Lucas*, 647 F.2d 573, 576 (5th Cir. 1981), *affirming on remand* 598 F.2d 958 (5th Cir. 1979). Bush was a NASA engineer who claimed that his First Amendment rights had been violated by reason of a demotion allegedly made in retaliation for criticizing his own job in a television interview. 598 F.2d 958. On remand from this Court after *Carlson*, the court of appeals ruled that the plaintiff lacked a constitutional cause of action.

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[9] *Cf. Sonntag v. Dooley*, 650 F.2d 904, 907 (7th Cir. 1981), *rev'g* 495 F.Supp. 348 (N.D.Ill. 1980). There, the former curator of a military museum claimed that alleged mistreatment by U.S. Army officers forced her to retire and thus violated her Fifth Amendment rights. The court of appeals, noting that no alternative remedy had been available to the plaintiff, held that the defendant Army officers had "not demonstrated 'special factors counseling hesitation' under *Carlson* because they do not enjoy 'such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate.' " *Id., quoting Carlson v. Green, supra*, 446 U.S. at 19.

647 F.2d 573. In so deciding, the Fifth Circuit stressed the efforts Congress had taken to strike a careful balance between "the employee's rights as a citizen" and "the Government's interest in the efficient conduct of the nation's business":

> The very comprehensiveness of the legislative and administrative scheme evinces Congress' awareness of the special relationship and of the Government's responsibilities toward its civil service employees.
>
> The employer-employee context of this case serves to distinguish it from suits such as *Bivens* and *Carlson* which involved plaintiffs as private citizens seeking damages against agents of the Government acting in its sovereign capacity. Inferring a *Bivens* remedy in this case would tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs. It might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the framework it has so painstakingly established. [*Id.* at 577.]

These principles are equally applicable here. Indeed, this case is indistinguishable from *Bush v. Lucas*: both plaintiffs had availed themselves of Civil Service Commission relief; both had obtained judicial review of that relief; and both were reinstated with back pay.[10] Respondent has the same "unique relationship" to the federal government as did the civil servant plaintiff

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[10] In *Carlson v. Green* this Court expressly held that the availability of substitute remedies is relevant to the implication of a constitutional cause of action. Indeed, the "balance, completeness, and structural integrity" of the legislative and administrative scheme for redress of civil servants' claims led this Court in *Brown v. General Services Administration*, 425 U.S. 820 (1976), to rule that the federal statutes (there, § 717 of the Civil Rights Act of 1964) provide "the exclusive judicial remedy for claims of discrimination in federal employment."

Fitzgerald's Air Force position was in the "excepted service" and was consequently not subject to the protection afforded by the Civil

(footnote continues)

in *Bush*, and inferring a *Bivens* cause of action here would also "tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs." *Id.* Indeed, in view of the breadth and importance of petitioners' responsibilities, the rationale for allowing them "wide latitude" in the handling of internal governmental affairs applies even more strongly here than it did in *Bush v. Lucas*. Accordingly, this Court should hold that, on the facts of this case, respondent has no cause of action for damages for any alleged violation of his constitutional rights.[11]

(footnote continued)

Service Rules and Regulations for the competitive service. *Fitzgerald v. Hampton*, 467 F.2d 755, 758 (D.C. Cir. 1972). *See* J.A. 63a-64a (CSC Decision at 3). But in *Hampton*, the court of appeals ruled that "Fitzgerald's employment is under *legislative protection*," since he was a "preference eligible" veteran and was entitled to a hearing before the Civil Service Commission. 467 F.2d at 762 (emphasis in original). As in *Bush v. Lucas*, the *Hampton* court found that Congress had created an elaborate mechanism to protect the employment rights of "preference eligibles" such as Fitzgerald:

> In enacting the Veterans Preference Act, Congress carefully outlined the preference to be given veterans who are seeking government employment, the circumstances under which they can be reduced in rank, the reasons for which they can be removed, and the procedures which the agencies are to follow in any such actions involving a veterans' preference eligible employee.
>
> . . . Clearly Congress intended to give preference eligible employees rights which would assure them of additional security in their public employment not enjoyed by unprotected federal employees. . . . [*Id.*]

[11] The very reasons that compel the conclusion that there is no constitutional cause of action also serve to deny respondent any implied private rights of action under statutes protecting the right of federal civil service employees to petition Congress (5 U.S.C. § 7211), and making it a crime to obstruct Congressional testimony (18 U.S.C. §1505). These statutory claims have even less merit than his constitutional cause of action, because this Court made it clear in *Davis v. Passman, supra*, that statutory causes of action would be implied far less readily than would constitutional ones. Whether a private right of action for damages can be implied under these statutes is, as this Court has made clear, a question of Congressional intent. *See Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. ____ (May

(footnote continues)

III. COMPELLING CONSIDERATIONS OF PUBLIC POLICY REQUIRE THAT SENIOR PRESIDENTIAL ADVISERS BE ACCORDED ABSOLUTE IMMUNITY.

A. Absolute Immunity Safeguards the "Unflinching Discharge" of Public Responsibilities.

Immunity from civil damages is "not a badge or emolument of exalted office." *Barr v. Matteo*, 360 U.S. 564, 572 (1959). It " 'is not for the protection or benefit of a malicious or corrupt . . . [official], but for the benefit of the public.' " *Imbler v. Pachtman*, 424 U.S. 409, 418 n.12 (1976), *quoting Pierson v. Ray*, 386 U.S. 547, 554 (1967). *See Tenney v.*

(footnote continued)

26, 1981); *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche, Ross & Co. v. Redington*, 442 U.S. 560 (1979). There is no indication on the face of either of the two statutes on which respondent relies that Congress intended to provide for a private right of action. Nor can respondent point to any such indication in the legislative history. Indeed, the fact that Congress provided for other remedies in those statutes is itself persuasive evidence that Congress did *not* intend to provide for the additional remedy of damages. *See Transamerica Mortgage Advisers, Inc. v. Lewis, supra*, 444 U.S. at 19-21; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 419 (1975). A civil servant who claims 5 U.S.C. § 7211 has been violated has the full panoply of civil service remedies available to him. And of course, Congress specified penal sanction for the violation of 18 U.S.C. § 1505. Moreover, respondent is not even a member of the class for whose benefit the statutes were enacted. 5 U.S.C. § 7211 and 18 U.S.C. § 1505 were designed to protect the legislative process, not to give one such as Fitzgerald a right to seek damages. *Cf. Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (10th Cir.), *cert. denied*, 345 U.S. 941 (1953) (plaintiffs suing for employment discharge allegedly in retaliation for their grand jury testimony held not entitled to any right of action under the related statute of 18 U.S.C. § 1503, because that statute was enacted not for the benefit of the plaintiff, but for the "protection of the administration of justice" and "in the interest of the public").

Moreover, even if respondent had an implied statutory cause of action, petitioners would be absolutely immune from liability under it. *Butz v. Economou*, 438 U.S. 478 (1978), held that federal executive officials were entitled only to qualified immunity when a constitutional cause of action was asserted, but retained their absolute immunity in all other cases. *See Barcelo v. Brown*, 478 F.Supp. 646, 662 (D.P.R. 1979), *vacated in part and remanded*, 643 F.2d 835 (1st Cir. 1981).

Brandhove, 341 U.S. 367, 377 (1951) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.") (Frankfurter, J.).

The classic statement of the policy underlying immunity is that of Judge Learned Hand:

> The justification for...[granting immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. [*Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).]

This concern for the effective functioning of government has led to the granting of absolute immunity to judges, prosecutors, and legislators — and even to civil service hearing examiners and agency attorneys participating in federal administrative proceedings — on the ground that their positions were "functionally comparable" to those of a judge and prosecutor. *See Stump v. Sparkman*, 435 U.S. 349 (1978) (judicial immunity); *Imbler v. Pachtman, supra* (prosecutorial immunity); *Gravel v. United States*, 408 U.S. 606 (1972) (Congressional immunity); *Tenney v. Brandhove, supra* (immunity for state legislators); *Butz v. Economou*, 438 U.S. 478, 513, 517 (1978) (immunity for hearing examiners and agency attorneys). Absolute immunity interposes a complete barrier against civil suit and damages, even in cases where the accused official acted with malice or bad faith or did not have a reasonable ground to believe his action was legal, since, as Judge Hand explained, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire v. Biddle, supra*, 177 F.2d at 581.

In acknowledging the "special functions" of judges, prosecutors and other quasi-judicial officials, this Court has recognized the necessity for absolute immunity because of the inhibiting effect that the prospect of a trial and liability for damages would have on public decision-making. *Butz v. Economou, supra,* 438 U.S. at 508. Such officials are highly visible and exposed to vindictive suits by persons claiming to be aggrieved by the officials' performance of their public duties. *Id.* at 508-12. For example, in the case of prosecutors the Court has noted:

> The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. [*Imbler v. Pachtman, supra,* 424 U.S. at 424-25.]

As pointed out below, this rationale for absolute immunity is even more applicable to the President and his senior advisers than to judges, legislators, prosecutors, and other quasi-judicial officials.

B. Senior Presidential Advisers Are Derivatively Entitled to Absolute Presidential Immunity.

The rationale for absolute Preidential immunity is persuasively articulated in the brief of co-petitioner Nixon, and petitioners Harlow and Butterfield adopt the arguments presented there, to the extent that a senior Presidential adviser's immunity may be considered to be derivative from that of the President himself.

In *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975), this Court held that high-level Congressional aides, in that case a chief counsel to a Congressional subcommittee, have a derivative right to the same absolute immunity enjoyed by Congressmen under the Speech and Debate Clause, to the extent that the aides' activities are "essential to legislating." 421 U.S. at 508, *quoting Gravel v. United States,* 408 U.S. 606, 621

(1972). *See also Doe v. McMillan*, 412 U.S. 306 (1973). *Cf. Dombrowski v. Eastland*, 387 U.S. 82 (1967). In *Gravel*, another Speech and Debate Clause case, the Court expressly ruled that

> [f]or the purpose of construing the privilege [of immunity] a Member and his aide are to be "treated as one." [T]he day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the ... [immunity] will inevitably be diminished and frustrated ... [The immunity] applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected ... act if performed by the Member himself. [*Gravel v. United States, supra*, 408 U.S. at 616-18, *quoting United States v. Doe*, 455 F.2d 753, 761 (1st Cir. 1972).]

Surely the rationale for a rule extending immunity to the Senator's aide in *Gravel* applies with even greater potency to senior advisers to the nation's Chief Executive.

Thus, senior Presidential aides, such as petitioners here, should be derivatively accorded the same absolute immunity as the President, because the functions they perform are "essential" to the President's discharge of his constitutional duties. Obviously the President cannot be expected to do everything himself. As this Court has previously recognized, the President is crucially dependent on obtaining uninhibited advice from his senior staff:

> The President's need for complete candor and objectivity from advisers calls for great deference from the courts.
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> ....
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> ... Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.
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> ....

> . . . [There is a] necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking .... [T]hose who assist [the President] must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. *These...considerations...[are] fundamental to the operation of Government and [are] inextricably rooted in the separation of powers under the Constitution.* [*United States v. Nixon*, 418 U.S. 683, 705-06, 708 (1974) (emphasis added) (privilege for confidential Presidential communications is subordinate only to specific need in criminal prosecution).]

Having already acknowledged that a senior staff of advisers is an indispensable element of the modern Presidency, the Court should grant the same protection to these advisers as is now enjoyed by legislators' aides.[12] Not all White House staff members should be derivatively entitled to absolute Presidential immunity, for they do not all need its protection. However, those who directly advise the President in the performance of his public duties or who are directly and intimately involved in the discharge of those duties do require the protection of immunity. Absolute immunity for the President alone would be of little value if his senior advisers were restricted in the "unflinching discharge" of their duties by the fear of subsequent lawsuits.

C. The "Special Functions" Performed by Senior Presidential Advisers Require that They Be Accorded Absolute Immunity.

In the case of prosecutors, judges and officials exercising quasi-judicial functions, the rationale for immunity has been

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[12] As Mr. Justice Harlan observed in *Barr v. Matteo, supra*, which extended absolute immunity to an Acting Director of the District of Columbia Office of Rent Stabilization:

> The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy. [360 U.S. at 573 (footnote omitted).]

thought so compelling that, as previously noted, these officials have been granted absolute immunity from claims arising under both state law and the Constitution. *Butz v. Economou, supra,* 438 U.S. at 508-17.

Officials of the federal executive branch acting "within the outer perimeter of [their] line of duty" have been granted absolute immunity from civil actions on state tort claims. *Barr v. Matteo, supra,* 360 U.S. at 575. However, in cases involving alleged deprivations of constitutional rights, this Court has recently held that executive branch officials (even Cabinet-level ones) are generally entitled to only a qualified immunity. *Butz v. Economou, supra.* But even in the case of constitutional torts the Court nonetheless expressly recognized that there were certain officials whose "special functions" placed them in "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507-08. The inclusion of senior Presidential advisers in this special category would thus entitle them to absolute immunity on a basis independent of its derivation from the President himself.

Indeed, it would be hard to think of any group of officials so clearly embraced by the *Butz* language as are Presidential advisers. Their absolute immunity is essential for the conduct of public business. They deal every day with matters of critical importance to the nation. Their actions and failures to act have at least as direct and far-reaching an impact as the decisions of judges and prosecutors. A President's key staff members are far more frequently in the public eye than most judicial branch officials. Their exposure to harassing litigation is illustrated by this very case. As Judge Gesell, sitting by designation on the appellate panel in *Halperin,* noted:

> [It is a] fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected

> areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover [sic] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.
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> ....
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> The effect of this development upon the willingness of individuals to serve their country is obvious. Not only are the personal funds of such officials placed at hazard but many of these cases are political in character, involve highly controversial acts, and will necessarily embroil juries in passing upon the intricacies of executive decisionmaking. [*Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring).]

Many, if not most, of the matters reaching the White House come to it from an executive department. The complexity and scope of these matters will often "arouse the most intense feelings" in the political arena. *Butz v. Economou, supra,* 438 U.S. at 509 n.36, *quoting Pierson v. Ray, supra,* 386 U.S. at 554. It is an essential function of a Presidential adviser to decide which matters warrant review by the White House staff and the President himself, as well as to suggest a decision on the merits. The senior White House adviser is daily called upon to second-guess decisions of executive departments. Indeed, the sheer number of matters presented to him in this difficult role virtually guarantees that the senior Presidential adviser would — absent absolute immunity — be the target of numerous vindictive lawsuits.

Moreover, the adviser's decisions on the "grave, complex and unique" problems confronting the White House (*Halperin v. Kissinger, supra,* 606 F.2d at 1215 (Gesell, J., concurring)) must often be made under exigencies and political pressures far more intense than those to which judicial and prosecutorial decisions are subjected. These exigencies and pressures preclude an independent and detailed investigation of every matter referred to the White House by an executive department, and

thus the adviser, in making threshold determinations as to which matters warrant White House action, is entitled to rely on information supplied by the executive department. The Court has previously taken note of the unique circumstances of high-level executive officials, and, in an immunity suit involving a Governor and high-level state officers, has observed:

> In the case of higher officers of the executive branch ... the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions — is virtually infinite ... [O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. [*Scheuer v. Rhodes,* 416 U.S. 232, 246 (1974).]

Just as the possibility of anything less than absolute immunity for judicial and prosecutorial officials would have "an adverse effect" (*Butz v. Economou, supra,* 438 U.S. at 510) on the judicial system, so too would the elimination of absolute immunity for senior Presidential advisers have an inhibiting effect on the flow of information and ideas within the White House. "It simply defies logic and common experience to suggest that officials will not have [the fear of litigation] in the back of their minds when considering what official course to pursue." *Id.* at 526-27 (Rehnquist, J., concurring and dissenting in part).

D. Anything Less than Absolute Immunity for Senior Presidential Advisers Would Not Adequately Serve the Public Interest.

Since the fundamental purpose of immunity is to eliminate the pernicious conflict between discharging public responsibilities and the fear of litigation and liability, the official must be assured, at the time of decision-making, that he will be free from the burdens and risks of any potential lawsuit. The minority in *Butz* pointed out that if an official "may never know until inquiry by a trial court whether there is a possibility that vexatious constitutional litigation will interfere with his

decisionmaking process, the [official] will obviously think not only twice but thrice about ..." making a decision having the potential to provoke litigation. *Butz v. Economou, supra,* 438 U.S. at 527 (Rehnquist, J., concurring and dissenting in part). Consequently, these inhibiting effects will not be eliminated by a grant of qualified immunity, because that defense can be overcome by showing that the official had no reasonable grounds to believe his action was legal or that he acted with malice or bad faith. *Id.* at 497-98, *citing Scheuer v. Rhodes, supra,* 416 U.S. at 247-48 (1974). *See Wood v. Strickland,* 420 U.S. 308, 322 (1975).

Qualified immunity, at least as it is now understood by the lower courts,[13] affords no threshold protection, as it routinely entails a full trial on the good faith element of the defense. This was explicitly recognized by the court of appeals in *Halperin* (606 F.2d at 1209, 1214), and by the minority in *Butz,* which observed that "summary judgment on affidavits and the like is even more inappropriate when the central, and perhaps only, inquiry is the official's state of mind." 438 U.S. at 527 (Rehnquist, J., concurring and dissenting in part).

The trial typically required in qualified immunity cases, where senior advisers will have to reveal "the intricacies of executive decisionmaking" (*Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring)), would run counter to both the constitutional separation of powers doctrine and the privilege for confidential Presidential communications recognized in *United States v. Nixon, supra.* Historical and policy considerations alike militate against the kind of recurring judicial oversight of White House discretionary actions that would occur were the President and his senior advisers to be denied absolute immunity. The framers of our constitutional scheme foresaw that the system of checks and balances as well as the political constraints of the election process and public opinion would serve to detect and deter abuses of power. They did not intend that there should be routine intrusion by the judicial branch into the Chief Executive's office—yet absent absolute immunity, senior Presidential advisers will be subject

[13] *See* discussion in Point IV, *infra,* at pp. 40-43.

to litigious harassment and will frequently have to justify their decisions to juries in civil damages suits. The consequences would inevitably prove so burdensome as to be "unduly disruptive of the Executive Branch and, therefore, unconstitutional ...." *Nixon v. Administrator of General Services*, 433 U.S. 425, 445 (1977). An example of just how "unduly disruptive" such litigation can be is this case, which demonstrates how a plaintiff can piece together a few bits of evidence, speculate as to wrongful conduct, spin out some theory of action, and ensnare a President and two of his senior advisers in years of vexatious discovery, depositions and pretrial skirmishes.

Moreover, even if effective means of summary disposition of qualified immunity cases were available (*see* Point IV, *infra*), it is still possible that innocent officials would be put to the risk of persuading a jury years later that their "political [and often] highly controversial acts" were reasonable and in good faith. *Halperin v. Kissinger, supra*, 606 F.2d at 1214 (Gesell, J., concurring). To paraphrase this Court's comment in a case involving legislative immunity, "[i]n times of political passion, dishonest or vindictive motives are readily attributed to ... [White House] conduct and as readily believed. Courts are not the place for such controversies." *Tenney v. Brandhove, supra*, 341 U.S. at 378 (1951) (Frankfurter, J.).

At trial, senior Presidential advisers would be faced with the perhaps impossible task of conveying to a lay jury the "grave, complex and unique responsibilities" (*Halperin v. Kissinger, supra*, at 1215) of White House advisers and the pressures and urgency under which these responsibilities must be discharged. The difficulties and unfairness of this type of retrospective assessment impelled this Court in *Imbler v. Pachtman, supra*, to extend an absolute, rather than a qualified, immunity to state prosecutors:

> [I]f the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

....

> ... The presentation of [complicated aspects of a prosecutor's duties] in a ... [personal damages] action often would require ... the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.
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> ....
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> ...[T]he alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of [government]. [*Imbler v. Pachtman, supra,* 424 U.S. at 425-28.]

This rationale is equally if not more compelling in the case of senior Presidential advisers. Because "an official may later find himself hard put to it to satisfy a jury of his good faith" (*Gregoire v. Biddle, supra,* 177 F.2d at 581), immunity " 'would be of little value if ... [a senior Presidential adviser] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against [him] based upon a jury's speculation as to motives.' " *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 405 (1979), *quoting Tenney v. Brandhove, supra,* 341 U.S. at 377 (Frankfurter, J.).

Given the inhibiting effect of the uncertainties consequent upon qualified immunity, it is therefore essential for the effective functioning of government that senior Presidential advisers be freed by absolute immunity from the "constant dread of retaliation." *Gregoire v. Biddle, supra,* 177 F.2d at 581.

E. Whether by Reason of the Particular Facts of this Case or a General Balancing Test, Petitioners Here Are Entitled to Absolute Immunity.

Petitioners here are undoubtedly within the "special functions" category. They had broad, discretionary responsibilities, played a part in literally hundreds of matters of Presidential concern, and were directly charged by the President with carrying out his orders. The proper discharge of their duties was quintessentially of the kind requiring the protection of absolute immunity. Moreover, it is beyond question that in giving an assessment of Congressional reaction to the Secretary of the Air Force and in giving a recommendation to one's immediate superior on a matter that had attracted Presidential attention, petitioners Harlow and Butterfield were acting "within the outer perimeters of [their] line of duty." *Barr v. Matteo, supra,* 360 U.S. at 575.

In response to the policy considerations in the public interest to extend absolute immunity to senior Presidential advisers, respondent's chief argument is that to do so would make it difficult in future cases to draw a line between those officials who are and those officials who are not entitled to the protection of absolute immunity. Brief for Resp. at 22-23 & n. 14 (Feb. 9, 1981). If this sort of argument were to be taken seriously, no classification could ever be made in any situation. Granted that not all executive branch officials or even all White House staff members should be entitled to absolute immunity, it is sufficient for purposes of this case that the controlling considerations of public policy justify granting absolute immunity to these petitioners.

It is not true, in any event, that no rational basis can be found for drawing the necessary line. A basis for doing so can be found in *Barr v. Matteo, supra,* where the Court noted that

> the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted — the relation of the act complained of to "matters committed by law to his control or

> supervision" ..., — which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil ... suits. [360 U.S. at 573-74, *quoting Spalding v. Vilas*, 161 U.S. 483, 498 (1896).]

The balancing of factors implicit in *Barr* was made explicit in *Butz*, when the Court said that it must "reconcile the plaintiff's right to compensation with the need to protect the decision-making processes of an executive department." *Butz v. Economou, supra*, 438 U.S. at 503. The first element of this balancing test takes into account the extent to which the barrier to suit consequent upon the grant of absolute immunity would leave unredressed a genuine constitutional injury. The aim of affording a remedy to citizens who have experienced constitutional deprivations at the hands of federal officials was the explicit basis for this Court's decision in *Davis v. Passman, supra*. It was also the basis for the restriction on absolute immunity laid down by *Butz v. Economou, supra*. Although the availability of an alternative remedy should not of course be the sole factor determining whether a particular federal official, irrespective of his level of responsibility, should receive absolute immunity, it would clearly be relevant.[14] Indeed, as noted above in Point II, granting absolute immunity for constitutional torts arising from White House review of an executive department action would rarely, given the statutory and administrative remedies typically available in such situations, leave plaintiffs without a remedy.

The "need to protect the decision-making processes of an executive department" forms the second element of the balancing test. This addresses the degree to which the official's policy and decision-making responsibilities—whether by reason of their far-reaching nature, subject matter, political visibility,

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[14] In *Imbler v. Pachtman, supra*, 424 U.S. at 427, 428 n. 27, the Court expressly noted that the availability of an alternative remedy was relevant to the decision to grant absolute immunity to state prosecutors. The alternative remedy there was a collateral, post-conviction *habeas corpus* action.

complexity or otherwise — are likely to provoke lawsuits by individuals claiming an "unconstitutional animus." *Butz v. Economou, supra,* at 512. Obviously, the greater the level of responsibility and breadth of discretion vested in the official, the more likely that matters of great public importance will be adversely affected by any deterrent to the "unflinching discharge" of his official duties. *Gregoire v. Biddle, supra,* 177 F.2d at 581. Moreover, officials — such as White House advisers — whose roles require that they review or take part in numerous decisions are more likely to be the target of lawsuits than officials who deal with only a limited range of matters. Even small and trivial lawsuits "could impose unique and intolerable burdens" upon officers charged with wide-ranging responsibilities. *Imbler v. Pachtman, supra,* 424 U.S. at 425-26.

Petitioners, by reason of their "special functions" as senior White House advisers, are well within the protected side of whatever line is suggested by these considerations. All of the factors bearing upon the effective functioning of government militate strongly in favor of giving them absolute immunity. The level and scope of their responsibility demands — for the benefit of the public — the protection thus afforded. Moreover, the very subject of the action that is the focus of this case, namely, a personnel decision, is the type of decision that is perhaps most prone to provoking damages suits by those affected.

Finally, allowing petitioners immunity would hardly leave Fitzgerald remediless: after Civil Service Commission review of the Air Force's decision and judicial review of the Commission's decisions, he has been reinstated with back pay. He now seeks additional, extraordinary relief for an injury arising out of the same incident for which he has already been compensated. The granting of absolute immunity to these senior Presidential advisers is under such circumstances fully warranted and, indeed, required.

IV. THIS COURT SHOULD CLARIFY THE STANDARD FOR PRETRIAL DISPOSITIONS OF QUALIFIED IMMUNITY CASES BECAUSE THE LOWER COURTS HAVE VITIATED THE DEFENSE BY ROUTINELY ALLOWING SUCH CASES TO PROCEED TO TRIAL.

A. Qualified Immunity, as Envisioned in *Butz v. Economou*, Has Not Proven "Workable."

If senior Presidential advisers faced with allegations of unconstitutional conduct, such as petitioners here, are deemed not entitled to absolute immunity, either derivatively or because they do not perform "special functions requir[ing] a full exemption from liability," *Butz v. Economou* would remit them to qualified immunity. 438 U.S. at 507-08. Qualified immunity, however, was not intended to be an illusory defense. On the contrary, the *Butz* majority stressed the point that the "principle of only qualified immunity for constitutional violations ... should prove ... workable" because its key purpose — namely, to avoid a trial on the merits — would be achieved by summary disposition of unsupported claims:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading .... [D]amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity .... In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits. [*Id.* at 507-08.]

Unconvinced by this assurance, the minority pointed out "that anytime a plaintiff can paint his grievance in constitutional colors," the defendant will be forced to go to trial on the good faith element of the defense. *Id.* at 520 (Rehnquist,

J., concurring and dissenting in part). The minority warned that

> if we allow a mere allegation of unconstitutionality, obviously unproved at the time made, to require a Cabinet-level official, charged with the enforcement of the responsibilities to which the complaint pertains, to lay aside his duties and defend such an action on the merits, the defense of official immunity will have been abolished in fact if not in form. The ease with which a constitutional claim may be pleaded in a case such as this, where a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that. The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his actions on the merits. The result can only be damage to the "interests of the people," ... which "require[s] that due protection be accorded to [Cabinet officials] in respect of their official acts." [*Id.* at 522, *quoting Spalding v. Vilas*, 161 U.S. 483, 498 (1896) (brackets in original).]

Subsequent cases have demonstrated the prescience of this warning.[15] The results in the lower courts have all too often belied the confidence expressed by the *Butz* majority. Trial judges have consistently found that "practical difficulties"

[15] In dissenting from a denial of *certiorari* in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), Mr. Justice Powell observed that the Court's decision in *Butz* "would invite litigation in which constitutional claims easily are asserted." *Id.* at 765 (Powell, J., concurring and dissenting in part). But the Court recognized "that extravagant charges might force officials to trial on claims that lacked a substantial basis in fact," and it "therefore cautioned the judiciary ... to protect official defendants from groundless claims." *Id.* However, in that case, as in the present one, "the record [was] wholly 'devoid of proof of ... participation' by the federal defendants in the conspiracy alleged." *Id.* To proceed to trial in that case would mean that "similar allegations could survive properly supported motions for summary judgment on the basis of speculative inferences from unrelated evidence." *Id.* This, Mr. Justice Powell remarked, "vitiates the protection we sought to insure in *Butz*." *Id.* at 765-66.

(*Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J. concurring)) stood in the way of this Court's admonitions to provide summary disposition. They have instead routinely denied motions for summary judgment on the ground that the claim of malice or bad faith automatically raised a triable issue of fact as to the defendant's state of mind. Indeed, they have treated a plaintiff's mere allegation of malice (occasionally supported by some circumstantial inference) as creating such an issue.[16]

The district court's denial of petitioners' motion for judgment on the issue of qualified immunity is typical of this tendency to avoid summary disposition. In his separate opinion in *Halperin,* Judge Gesell himself served notice that he would reluctantly be compelled to send qualified immunity cases to the jury:

> If a plaintiff can establish a genuine material issue of fact as to any element of the immunity defense the case will have to proceed to trial. In my view this approach substantially undermines, if not destroys, the immunity doctrine.
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> ....
>
> ... It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the

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[16] *See Clark v. United States,* 481 F.Supp. 1086, 1092-93 n.5 (S.D.N.Y. 1979), *appeal dismissed in part and stayed in part,* 624 F.2d 3, 4 (2d Cir. 1980) (mere pleading of malice sufficient to prevent dismissal on qualified immunity ground). *See also Halperin v. Kissinger, supra; Forsyth v. Kleindienst,* 599 F.2d 1203 (3d Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth,* 453 U.S. ____ (June 29, 1981); *Smith v. Nixon,* 606 F.2d 1183 (D.C. Cir. 1979), *cert. denied,* 453 U.S. ____ (June 29, 1981); *Zweibon v. Mitchell,* 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied,* 453 U.S. ____ (June 29, 1981); *Dellums v. Powell,* 490 F. Supp. 70 (D.D.C. 1980), *aff'd in part and rev'd in part,* No. 80-1331, slip op. (D.C. Cir. July 24, 1981). *See generally* Friedman, "The Good Faith Defense in Constitutional Litigation," 5 Hofstra L. Rev. 501, 519 n.114 (1977); Note, "Presidential Immunity from Constitutional Damage Liability," 60 B.U.L. Rev. 879, 906 n.211 (1980).

> immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient. In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits. [*Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring).]

By habitually requiring that qualified immunity cases proceed to full trials, the district courts have embarked on a course that frustrates the policy of immunity generally and, in the specific case of Presidential advisers, directly contravenes the constitutional underpinnings of the immunity defense. As noted in Point III above, the recurring judicial intrusion into White House decision-making that is inevitable in qualified immunity trials runs counter to the separation of powers and the protection of confidential Presidential communications.

B. This Case Itself Shows How The Qualified Immunity Defense Has Been Vitiated.

The instant case is itself an egregious example of the disregard in practice of this Court's admonitions to "weed out insubstantial claims." *Butz v. Economou, supra,* 438 U.S. at 527. After more than seven years of litigation, and after exhaustive discovery yielding thousands of pages of depositions and hundreds of pages of White House documents, Fitzgerald has been unable to uncover any evidence whatever showing that petitioners had a part in the decision to eliminate his job. There is no evidence of a conspiracy to these ends. Yet petitioners have been denied summary judgment because Judge Gesell felt himself bound by the controlling precedent in the D.C. Circuit's decision "to extend no more protection to top federal officials than is afforded by the normally applicable summary judgment principles." *Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring). The inference is inescapable, in light of Judge Gesell's concurring opinion in *Halperin,* that had it not

been for the appellate panel's decision in that case he would have granted petitioners' motion here.[17]

Harlow and Butterfield were called upon daily to give their views and advice on questions that might affect the interests of all kinds of individuals and groups. Fitzgerald's job status was one of countless such matters. If respondent can force this lawsuit to trial, then so too can almost any of the hundreds of other individuals or groups aggrieved by government decisions in which Presidential advisers like Harlow and Butterfield had some fleeting or tangential role. No senior Presidential adviser would be immune from suit; an enterprising plaintiff whose case had attracted public attention could always find some meeting or telephone call or memorandum in which his situation had been discussed. And taking that as a foundation, some theory of causality and liability could be fabricated.

Allegations of malice and civil conspiracy, weakly supported by factual inferences drawn from the slightest bits and pieces of evidence, should no longer be allowed to serve as a simple formula for defeating the pre-trial protection of qualified immunity. For if this formula is not struck down, senior advisers in every administration can never escape the inevitable risks and burdens of trial and will always live and govern in fear of financial ruin. It is time to end this pernicious threat to the administration of government.

C. A Higher Evidentiary Burden Should Be Required to Defeat Summary Judgment on the Ground of Qualified Immunity.

To give life to the defense of qualified immunity as envisioned in *Butz*, the sufficiency of plaintiff's pleading and evidence must be held to a more exacting standard. One

[17] Indeed, Judge Gesell, sitting as the district court, even declined to hear oral argument on the immunity issue in connection with the summary judgment motion, although he permitted argument on other issues.

practical approach to making summary disposition more readily available was suggested by Judge Gesell in his separate opinion in *Halperin:*

> In order to give the immunity doctrine some genuine force and effect, it appears to me that a plaintiff should be required to make a stronger showing than the Court's opinion requires on the immunity question before being permitted to proceed to trial. I would hold that the plaintiff must establish after the completion of discovery and before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith. [*Halperin v. Kissinger, supra,* 606 F.2d at 1215 (Gesell, J., concurring).]

Following this suggestion, the trial judge would determine on the motion for summary judgment whether the credible evidence uncovered by the discovery process added up to a clear and convincing showing of malice or bad faith on the part of the defendant. To assure consistent application of this approach, and thus give practical effect to the principles enunciated in *Butz,* this Court could set forth a rule of law that where the plaintiff has not established after discovery a quantum of evidence sufficient (in view of immunity's purpose of avoiding a trial) to warrant putting the good faith issue to trial, the lower courts must grant summary judgment on the ground of qualified immunity.[18]

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[18] Consistent with the suggestion that plaintiff be required to establish a greater amount of credible evidence to overcome a summary judgment motion based on qualified immunity than he would have to establish for a normal summary judgment motion, the plaintiff should have the burden of persuasion in establishing the sufficiency of this evidence. While this Court has expressly decided that the defendant has the burden of pleading good faith when qualified immunity is raised as a defense, *see Gomez v. Toledo,* 446 U.S. 635 (1980), this Court has not answered the question of who must bear the ultimate burden of persuasion. The decisions of the courts of appeals are in conflict on this question. *Compare Gaffney v.*

(footnote continues)

Obviously, the required quantum of evidence is inherently not susceptible to abstract formulation. Nor is it impossible, on the other hand, to give it some concreteness. The trial courts can be instructed by the Court that they should, for example, take into account the "remoteness" of the actions of the defendants from the alleged constitutional tort. Trial judges should not, in other words, recognize as sufficient to raise a triable issue a connection between the two that is merely "thin," conjectural, or tangential. The weight and sufficiency of the evidence bearing on malice or bad faith should also be subject to close scrutiny. The trial courts might appropriately, at the same time, be encouraged to consider the nature and breadth of the defendant's official responsibilities and the availability of alternative remedies. Assessment of these factors would help make the "clear and convincing" requirement more concrete.

In taking these considerations into account, the trial courts would bring to bear in qualified immunity cases the same balancing approach discussed above in the context of absolute immunity.[19] The appropriateness of this approach is highlighted by the salient fact that the difference between situations calling for absolute immunity and those in which only qualified immunity is available are, on their face, differences of degree, not of kind. The gradations between the two types of immunity correspond with a continuum of public responsibilities requiring (to varying degrees) the protection of immunity. At one end are the "special functions," falling within the "exceptional

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(footnote continued)

Silk, 488 F.2d 1248, 1250-51 (1st Cir. 1973); *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 61-62 (3d Cir.), *cert. denied*, 429 U.S. 979 (1976); *Douthit v. Jones*, 619 F.2d 527, 533 (5th Cir. 1980); *with McCray v. Burrell*, 516 F.2d 357, 370 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976); *Bogard v. Cook*, 586 F.2d 399, 412 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979); *Whitley v. Seibel*, 613 F.2d 682, 685 (7th Cir. 1980). At least one noted commentator has urged that the burden be put on the plaintiff, so as to provide "a necessary second level of protection for executive officials." Freed, "Executive Official Immunity for Constitutional Violations: An Analysis and a Critique," 72 Nw. U. L. Rev. 526, 562-63 (1978).

[19] *See* Point III, *supra*, at pp. 37-39.

situations where it is demonstrated that absolute immunity is essential to the conduct of the public business." *Butz v. Economou, supra,* 438 U.S. at 507. Ranged along the remainder of the continuum would be those officials who are entitled,

> in varying scope, [to] a qualified immunity ..., the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. [*Scheuer v. Rhodes, supra,* 416 U.S. at 247.]

Reference to the factors discussed above would give meaning to the "clear and convincing" requirement, assist the trial courts, and encourage a degree of uniformity and predictability that would give meaning to the defense of qualified immunity as envisioned in *Butz.*

D. Respondent Has Not Met This Higher Evidentiary Standard, and Petitioners Are Thus Entitled to Summary Judgment.

This case is precisely the kind of patently "insubstantial lawsuit" that would have been "quickly terminated" (*Butz v. Economou, supra,* 438 U.S. at 507) under the evidentiary standard suggested above.

As discovery is now complete, respondent has adduced all the evidence against petitioners he will be able to present at trial, and it is remarkably insignificant. Because the evidence is wholly circumstantial, respondent is forced to rely exclusively on inference and innuendo to make out his case. With respect to Harlow, the case is concocted from the mere fact that Harlow received three phone calls and had one "happenstance" meeting with Seamans, none of which indicate that Harlow played any role whatsoever in the Air Force's decision to terminate Fitzgerald's position. Indeed, respondent persists in his assertion that Harlow was responsible for what happened to Fitzgerald, notwithstanding that all the evidence actually points the other way: it is clear that Harlow, to the extent that he was concerned with the Fitzgerald matter at all, was *opposed* to the termination because of its potential for political repercussions

on Capitol Hill. There is no reason to doubt this fact, since Harlow's opposition is precisely what would be expected from one charged with maintaining harmonious Congressional relations.

Respondent's seven and a half-year search for evidence against Butterfield has been equally futile. Respondent's entire case against Butterfield is built on the fact that Butterfield made one telephone call and wrote one memorandum to his superior giving his recommendation (in admittedly pungent language) on the Fitzgerald matter. The telephone call and the memorandum were not initiated by Butterfield but were made in response to inquiries by his superior and the White House Press Office. Butterfield's responses came after the Air Force reorganization had been adopted and obviously could not have had any effect on that decision. Similarly, it is undisputed that his responses did not lead to any decision by the Pentagon or the White House not to rehire Fitzgerald: the Pentagon never knew about the telephone call and memorandum, and the White House, despite them, made a serious effort to find Fitzgerald another position.

Finally, it is easy to "reconcile the plaintiff's right to compensation" (*Butz v. Economou, supra,* 438 U.S. at 503) with the grant of immunity here, since respondent has successfully availed himself of the very remedy established by Congress to redress whatever injury he has suffered.

Consequently, the grant of qualified immunity to petitioners prior to trial is eminently warranted on this record under the approach suggested above. Clearly Fitzgerald has not shown by the preponderance of the evidence (much less by clear and convincing evidence) that Harlow or Butterfield was responsible for Fitzgerald's loss of employment or the failure to rehire. The remoteness of petitioners from the Air Force decision to reorganize, the "thin" and wholly circumstantial record in this case, the level and scope of petitioners' duties and responsibilities, and the availability of alternative remedies — all of which are relevant to respondent's evidentiary burden — require that summary judgment be granted.

To give meaning to the protection that qualified immunity was fashioned to afford, the Court should use this case to elaborate on its ruling in *Butz* and establish a legal standard for the granting of summary judgment motions on the ground of qualified immunity. Under this new standard, a defense of qualified immunity could be overcome only by plaintiff's adducing prior to trial the appropriate quantum of evidence. Such a rule not only would benefit both the lower courts and the federal officials who would be targets of suits similar to this one, but also would be a just and efficient way of reconciling the competing public policies favoring the unhampered functioning of government and the vindication of constitutional rights.

CONCLUSION

Petitioners respectfully ask that the district court's order denying petitioners' motion for summary judgment be reversed,[20] and that the district court be instructed either to (i) dismiss respondent's Second Amended Complaint with prejudice, on the ground that respondent has failed to state a claim for relief under the Constitution or federal statutes, or that petitioners are entitled to absolute immunity from any such claim by reason of their position and function as senior Presidential advisers, or (ii) enter judgment in favor of petitioners on the ground that they are entitled on this record as a matter of law to qualified immunity.

Respectfully submitted,

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[20] Reversal of the order of the district court, rather than the court of appeals, is proper here. The only question before this Court concerns the district court's denial of summary judgment, a question not reached by the court of appeals since it dismissed petitioners' appeal.